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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: LIN 00 232 52949 Office: NEBRASKA SERVICE CENTER Date: JAN 2 2 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a firm involved in geotechnical, geological, and environmental consulting with 29 employees and a gross annual income of $2,200,000. It seeks to extend the period of temporary stay granted to the beneficiary to work as an engineer. The director denied the petition finding that the beneficiary had spent the maximum allowable time in the United States as an H-1B nonimmigrant alien and the petition could not be approved.

On appeal, counsel submits a brief.

The regulation at 8 C.F.R. 214.2(h)(13)(i)(B) provides that when an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad.

Further, the regulation at 8 C.F.R. 214.2(h)(13)(ii)(B) provides that an H-1B alien in a specialty occupation who has spent 6 years in the United States under section 101(a)(15)(H) or (L) of the Act may not seek extension, change of status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The record reflects that the beneficiary has been employed in H-1B status in the United States from June 25, 1990. The record also reflects that the beneficiary departed the United States on May 7, 1997 and subsequently returned on April 12, 1998.

On appeal counsel argues that the beneficiary has satisfied the requirement of one-year abroad before reentry. Counsel admits that the beneficiary departed the United States on May 7, 2000 and subsequently returned on April 12, 2000 but argues that the beneficiary did not resume his H-1B employment until August of 1998. Counsel argues that this 14-month break in H-1B status satisfies the regulatory requirement.

Counsel's argument on appeal is not persuasive. The regulation clearly provides that an H-1B nonimmigrant who has spent the maximum 6-year period of stay in the United States must depart the

United States for a period of 1-year before another H-1B petition may be approved on his behalf. The record reflects that the beneficiary has not met that requirement and, as a result, the director's decision will not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.